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IN THE

Supreme Court of the United States

No. 735

BENEDICT F. FITZGERALD, Attorney at Law, *Petitioner*

v.

BILLIE SMITH CASSIDY, *Respondent*

In Re Denial of Admission Pro Hac Vice

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdictional Statement	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	4
Reasons for Granting Certiorari	5
Appendix: Per Curiam Opinion	1a

CASES CITED

Cooper v. Hutcheson, 184 F. 2d 119	3, 8
Earle v. McVeigh, 91 U.S. 503	6
Goldsmith v. U. S. Board of Tax Appeals, 270 U.S. 117	6
Joint Anti Fascist Refugee Committee v. McGrath, 341 U.S. 123	6
Konigsberg v. The State Bar Association of California, 353 U.S. 252	3, 7
Public Utilities v. Pollak, 343 U.S. 451, 72 S. Ct. 813	6
Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232	3, 7
United States v. U. S. Gypsum Co., 333 U.S. 364	8

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Benedict F. FitzGerald, an attorney at law, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, entered in the above captioned case, affirming the judgment of the United

States District Court for the Eastern District of Virginia.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit, in an opinion and judgment entered on November 7, 1957, affirmed the judgment of the United States District Court for the Eastern District of Virginia denying the right of the Petitioner Benedict F. FitzGerald to represent the plaintiff, his sister Irene R. Thomas, in a suit then pending in the United States District Court for the Eastern District of Virginia and accompanied the judgment with numerous findings of fact, and conclusions of law (Ap. ap. 81a-104a). The decision below has not been officially reported. A copy of the Opinion is hereto annexed.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254(1), of the United States Code.

QUESTIONS PRESENTED

1. Was not the Petitioner denied due process of law within the meaning of the Fifth Amendment when the trial judge denied him the right to participate *pro hac vice* and entered numerous findings of fact and conclusion of law which reflected adversely on Petitioner when many of the findings and conclusions related to matter which was transmitted to the trial judge in letter form by one of the parties and when the matter contained therein was not produced in open court and when Petitioner was not allowed an opportunity or notice to meet the charges?

2. Is not the decision of the court below denying the right of the Petitioner to participate in the trial *pro hac vice* and pursuant to Local Rule 9 of the Rules of the Eastern District of Virginia contrary to the recent decisions of this Court in *Konigsberg* v. *The State Bar Association of California,* 353 U.S. 252, and *Schware* v. *Board of Bar Examiners of the State of New Mexico,* 353 U.S. 232 and is not the opinion of the lower court insofar as it adjudicates the rights of an attorney who has been entirely admitted *pro hac vice* contrary to the decision of the United States Court of Appeals for the Third Circuit in *Cooper* v. *Hutchison,* 184 F. 2d 119?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, in pertinent part, provides:

> "No person shall be * * * deprived of life, liberty or property, without due process of law."

Rule 9, Sub. 5 of the Local Rules of the United States District Court for the Eastern District of Virginia:

> "A practitioner from another State or the District of Columbia may also be permitted to appear and conduct specific cases in association with a duly qualified member of the bar of this court, if the rules of the Federal Courts of the district in which he maintains an office extend a similar privilege to attorneys of this district, provided, however, that such foreign attorney in all appearances in court shall be accompanied by his resident associate. But, except where a party conducts his own case, no pleading or notice required to be signed by counsel shall be accepted by the clerk unless signed by an attorney who shall have been admitted to practice in this court, who shall be a resident of and maintain an office in this

State, who shall have entered his appearance of record in the case, with the address in the State where notice can be served upon him, and who shall have such authority that the court can deal with him alone in all matters connected with the case. This appearance shall not be withdrawn without leave of the court. Service of notice or other proceedings on him shall be equivalent to service on the parties for whom he appeared. Where a party is conducting his own case he shall file with his pleading a memorandum of one address within the district where notice can be served."

STATEMENT OF THE CASE

The Petitioner in this case is a practicing attorney entitled to practice in this Court, the courts af Massachusetts, the courts of the District of Columbia, this Court and other courts. He applied to the United States District Court for the Eastern District of Virginia pursuant to Local Rule 9 of that court for permission to prosecute an action for his sister *pro hac vice*. Mr. FitzGerald was initially, and pursuant to the provisions of this Rule, allowed to participate in this case (Memorandum of the Court, Ap. ap. 81A-82A). Subsequent thereto, Petitioner's brother-in-law, procured an arrest warrant out of a Police Court and because of the pendency of this proceeding, the Petitioner filed a praecipe withdrawing his appearance. As soon as the arrest warrant had been disposed of with a not guilty adjudication, the Petitioner sought to re-enter the case *pro hac vice*. Further objections were then interposed by the Respondent and her counsel John R. Willett relating to the accuracy of certain depositions that were taken. Accordingly, the trial judge scheduled hearings on

the motion to admit, limited to three issues. They were: (1) Why the depositions were not filed promptly; (2) What if anything the Petitioner had to do with them not coming over and (3) What was the accuracy of the depositions (Ap. ap. 161A). After hearing extensive testimony on these issues the Trial Court entered a judgment denying Petitioner's admission *pro hac vice* and accompanied it with adverse findings of fact A (Ap. ap. 99a) B (Ap. ap. 100a) E Ap. ap. 101-102a) F (Ap. ap. 102-103a) all of which petitioner had not notice of, some of which were referred to in an inflammatory letter addressed by the Respondent to the trial judge (Ap. ap. 17a). This letter which was not served on petitioner is referred to in the trial judge's Memorandum Opinion (Ap. ap. 84a). The trial judge wrote a Memorandum Opinion (Ap. ap. 81A through 99A), entered findings and conclusions (Ap. ap. 99A through 103A) and judgment (Ap. ap. 103A through 104A) denying the Petitioner Benedict F. FitGerald, Esq., the right to participate as counsel *pro hac vice*. Argument was had in the United States Court of Appeals for the Fourth Circuit and on November 7, 1957 (R. 4) the Court of Appeals for the Fourth Circuit entered an Opinion affirming the judgment of the United States District Court. (R. 4, 5)

REASONS FOR GRANTING CERTIORARI

I.

A denial of admission *pro hac vice* to a practicing attorney in good standing when accompanied by prejudicial findings of fact, reflecting adversely upon him entitled him *as a matter of right to appellant review of each adverse finding* and the proceedings in this

case violated due process of law when it was established that one of the parties to the litigation had by letter to the trial judge transmitted inflammatory matter which reflected adversely on the Petitioner and which *was referred to by the trial court in its Memorandum Opinion and Judgment denying Petitioner's admission pro hac vice.*

Although the Petitioner was called upon to meet three simple issues with respect to the filing of certain depositions, the record shows that the trial judge in his judgment transcended these three issues and entered Findings of Fact and Conclusions of Law on issues upon which the Petitioner had not received notice. As such, these findings deprived the Petitioner of procedural due process. *Earle* v. *McVeigh*, 91 U.S. 503; *Goldsmith* v. *U. S. Board of Tax Appeals*, 270 U.S. 117, and *Joint Anti Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123. The trial judge, in his Memorandum Opinion, made reference to the letter addressed to him by the Respondent. The derogatory nature of this letter is found in the record (Ap. ap. 17A to 19A). Since the receipt of this inflammatory matter caused the trial judge to refer to it in its opinion and make certain findings which were adverse to the Petitioner, and which were beyond the scope of the hearing for which the Petitioner was on notice, the trial judge should have invoked the doctrine announced by Justice Frankfurter in *Public Utilities* v. *Pollak*, 343 U.S. 451, 72 S. Ct. 813, and disqualified himself.

We feel that a substantial constitutional issue is presented by this record for if a party to litigation can foist upon a trial judge derogatory matter through the vehicle of the mails and that *matter is in anywise*

referred to in an opinion or judgment of the court as a basis for an adverse finding, the prejudicial nature of that transmission is manifest and due process as envisaged in the Fifth Amendment is automatically vitiated.

The Petitioner thus was denied due process of law in his application for admission, he was prejudiced by the transmission of the letter as manifested in the trial judge's ruling and this Court, in the interest of protecting procedural due process and its supervisory control over proceedings in Federal courts should grant the writ of certiorari.

II.

This Court recently reversed and remanded decisions of the State Courts of California and Nevada where applicants had been denied admission to practice for reasons which this Court on the record considered patently insufficient, thus depriving them of due process of law and equal protection of the laws. *Konigsberg* v. *State Bar of California,* 353 U.S. 252, *Schware* v. *Board of Bar Examiners of the State of New Mexico,* 353 U.S. 232.

In this case the Petitioner was an attorney in good standing and the sole basis for conducting hearings on whether he was to be admitted was the question in the trial judge's mind as to the delay in filing certain depositions, as to whether the Petitioner in anywise delayed the filing of said depositions and the accuracy of said depositions (Ap. ap. 161a). There was an abundance of testimony introduced fully explaining the circumstances surrounding the deposition and all representations made by the Petitioner. There was an abundance of character testimony from such in-

dividuals as the Honorable John W. McCormick, (Ap. ap. 78a-79a) the Honorable Foster Furcolo (Ap. ap. 80a-81a) and the late Honorable Henderson Lanham (Ap. ap. 75a) attesting to the good character of the Petitioner. With all these facts before the court, the court denied the Petitioner the right to proceed in findings which we suggest are not only clearly erroneous with the meaning of *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, but the effect of said judgment is to deprive the Petitioner of due process of law. This Court stated in the Konigsberg case:

> "A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action."

This record presents an attorney in good standing not only denied the right to practice *pro hac vice* but prejudicial with findings of fact of which he had no notice and opportunity to be heard.

We also suggest to the Court that since the Petitioner was originally admitted *pro hac vice* as reflected in the trial judge's opinion, the decision of the court below is contrary to the decision of the Third Circuit in *Cooper* v. *Hutchison*, 184 F. 2d 119. That decision construed a rule of the State Court of New Jersey very similar to Local Rule 9 in the present case and the Third Circuit, in affirming the right of the attorney to continue in the case *pro hac vice*, stated:

> "While admission pro hac vice is stated in the rule to be in the discretion of the court, the rights and duties of an outside lawyer, once so admitted, appear to be the same as those of a local lawyer."

In the light of the above, the Petitioner was denied substantive due process by the findings and judgment of the court below and this Court should grant a writ of certiorari.

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Per Curiam Opinion

Filed November 7, 1957

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7486

IRENE R. THOMAS, and BENEDICT F. FITZGERALD,
Appellants,

v.

BILLIE SMITH CASSIDY, *Appellee.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA

(Argued October 22, 1957. Decided November 7, 1957.)

Before PARKER, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Albert J. Ahern, Jr., (James J. Laughlin on brief) for Appellants. No appearance for Appellee. At the request of the Court John R. Willett argued.

PER CURIAM:

This is an appeal by an attorney at law from an order refusing him permission to appear pro hac vice in a case pending in a court before which he had not been admitted to practice. The attorney was not a citizen of the state

where the court was held and had not been admitted to practice in either the state or federal courts of that state. The judge denied him the right to appear in the case on the ground that he had been guilty of unlawyerlike conduct in connection with the case in which he wished to appear and which was being prosecuted by his sister as plaintiff.

It is well settled that permission to a non resident attorney, who has not been admitted to practice in a court, to appear pro hac vice in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge. 5 Am. Jur. p. 572; *Manning* v. *Roanoke & T. R. Co.* 122 N. C. 824, 28 S. E. 963; *Youmans* v. *Hanna* 35 N. D. 479, Ann. Cas. 1917E 263; Note 24 L.R.A.(N.S.) 754. There is grave doubt whether the denial of such permission is appealable, since what is denied is not a right but a mere privilege; but assuming that the matter is properly before us for review, we would not be justified in holding that the findings of the judge below were clearly wrong or that there was any abuse of discretion on his part.

Affirmed.